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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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# No. 1204

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MORRIS SAYLOR, DOING BUSINESS AS BELL COACH LINES,
*Appellant,*

*vs.*

STRAIGHT CREEK BUS, INC., ET AL.

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APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

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## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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*Straight Creek Bus, Inc.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

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# No. 1204

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MORRIS SAYLOR, DOING BUSINESS AS BELL COACH LINES,
*Appellant,*

*vs.*

STRAIGHT CREEK BUS, INC., A CORPORATION, ET AL.,
*Appellees.*

---

**STATEMENT ON BEHALF OF APPELLEE IN SUPPORT OF ITS MOTION TO DISMISS AND SHOWING THAT THE FEDERAL QUESTION UPON WHICH JURISDICTION IS PREDICATED IS NOT SUBSTANTIAL.**

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Jurisdiction is predicated upon Section 344(a) of Title 28, U. S. C. A., it being asserted that the Section 281.190(3) of the Kentucky Revised Statutes is in conflict with General Order No. 21 of the Office of Defense Transportation and therefore invalid.

Section 281.190(3), Kentucky Revised Statutes (which is a part of Chapter 281 of the Kentucky Revised Statutes dealing with the regulation of intra-state transportation of persons for hire by motor vehicle) provides as follows:

> "If any person holding a certificate over any public highway in this state between fixed termini or over a regular route fails to begin operation under the certificate on said line for a period of sixty days, • • •

such certificate shall be and become null and void, and an order to that effect shall forthwith be entered on the records of the Division of Motor Transportation."

Section 501.91 of General Order No. 21 of the Office of Defense Transportation, promulgated and adopted on November 15, 1942, provides as follows:

"On and after November 15, 1942, no person shall operate any commercial vehicle within the continental limits of the United States unless there is in force with respect to such commercial motor vehicle a certificate of war necessity issued by the Office of Defense Transportation governing such operation."

On June 28, 1943, the Division of Motor Transportation of the Commonwealth of Kentucky issued to the appellant, Morris Saylor, doing business as Bell Coach Lines, a Certificate of Convenience and Necessity (under KRS, 281.090) authorizing an intra-state (between points in Bell County, Kentucky) bus operation (R. 12).

The appellant did not commence operation under such certificate within sixty days after its issuance (as required by KRS, 281,190(3), and the appellee, Straight Creek Bus, Inc., which was then operating under a certificate over the route, on August 31, 1943, filed a petition with the Director of the Division of Motor Transportation, calling to his attention the fact that appellant had not commenced operation within the time required by the statute, and requesting that the Director (as mandatorily required by the statute) cause to be entered upon the records of the Division of Motor Transportation an order "to the effect" that the certificate of the appellant had "become null and void" by reason of his failure to commence operation (R. 13). The Director of the Division of Motor Transportation on August 31, 1943, notified the appellant to appear, "and to show cause, if any he has, why its Common Carrier Certificate

No. 316 should not be declared null and void in accordance with the terms of the aforementioned statute" (R. 16). On December 1, 1943, the appellant filed a response in which he asserted, as excusing his failure to begin operation under the certificate, that his failure to begin operation was attributable to his inability to obtain from the Office of Defense Transportation a "Certificate of War Necessity" for the busses which he proposed to operate over the route (R. 19). The Director of the Division of Motor Transportation held the response of the appellant to be insufficient (R. 25). On December 6, 1943, the appellant filed an amended response, in which he again asserted, as excusing his failure to begin operation under the statute, that immediately after the issuance of the Certificate he made application and sought to obtain from "the Federal Government and its agencies" authorization for the use of motor transportation facilities, gasoline, etc. over the route but that prior to a ruling thereon the petition asking for a revocation of its certificate was filed with the Division, and consequently the Federal Agencies would not either approve or disapprove its application pending a decision by the Director of the validity of its certificate, and that his delay in commencing operation was the result of the necessity that he comply with the Federal Regulations before beginning operation (R. 22). The Director held the amended response to be insufficient, and on December 6, 1943, entered an order "on the records of the Division of Motor Transportation" declaring Certificate No. 316 to be null and void because of the failure of the appellant to begin operation for a period of sixty days from the date of its issuance (R. 25).

As you see, the appellant did not in either his original or amended response plead or otherwise contend that KRS 291.190(3) was in conflict with General Order No. 21 of the Office of Defense Transportation, and that as a consequence

of such conflict, the statute was suspended or otherwise rendered invalid. But, much to the contrary, it was his position that his inability to obtain from "federal agencies" the required authorization for the use of the necessary transportation equipment to enable him to begin operation excused his failure to begin operation under the certificate within sixty days after its issuance.*

The appellant prosecuted an appeal from the aforesaid order of the Director of the Division of Motor Transportation to the Circuit Court in and for Franklin County, Kentucky (KRS 281.410). Upon an appeal to the Circuit Court from an order of the Director, the statute provides the Court shall hear the case upon the certified record or abstract, and "shall dispose of the case in a summary manner, its review being limited to determining whether or not the division acted without or in excess of its powers, the order was procured by fraud, the order is in conformity with the provisions of this chapter, and the finding of facts in issue is supported by any substantial evidence" (KRS, 291.420). The appellant in his Petition on Appeal asserts that *the order of the Director was erroneous,* and assigns as error six (6) reasons, the substance and effect of all of which is that the Director acted without and in excess of his power in entering the order declaring the certificate to be null and void, for the reason the Director erred in not holding that the inability of the appellant to obtain the approval of the Office of Defense Transportation excused his failure to begin operation within the time required by the statute.

The appellant in his Petition on Appeal did not allege or otherwise rely upon any invalidity of KRS, 281.190(3),

* It is said in the Jurisdictional Statement of the appellant, at page 3 thereof, that "the validity of KRS, 281.190(3) was questioned as being in conflict with Federal Regulations issued by the Office of Defense Transportation" in the response and amended response filed by the appellant before the Director of the Divison of Motor Transportation. We challenge the correctness of such statement.

growing out of its conflict with General Order No. 21 of the Office of Defense Transportation, or otherwise.

The Franklin Circuit Court vacated the order of the Director, holding that the inability of the appellant to obtain the required consent from the Office of Defense Transportation excused his failure to begin operation, and that the property rights of the appellant "should not have been ordered forfeited by the Director of the Division of Motor Transportation in view of the fact that his delay in the commencement of the operation of busses under the certificate was occasioned by the intervention of war and the necessity of Federal approval being obtained" (R. 34).

The appellee prosecuted an appeal to the Court of Appeals of Kentucky from the judgment of the Franklin Circuit Court vacating the order of the Director of the Division of Motor Transportation (KRS, 281.420).

The appellant in the brief filed on his behalf in the Court of Appeals for the first time contended that there was a conflict between the state statute and federal regulation. Upon such appeal, the principal contention of the appellant was that his failure to begin operation was excused because he was not at fault since his inability to begin operation was attributable solely to his inablity to obtain the consent of the Office of Defense Transportation. The Court of Appeals of Kentucky rejected both contentions, and in so doing said:

> "• • • But obviously that rule of necessity has no application here since there is no conflict between the Federal order and the State statute. True, the Federal order requires that during war time the operator of a commercial vehicle, regardless of whether he holds a state permit, must obtain a federal Certificate; but it cannot plausibly be said that such a requirement suspends a state statute which commands nothing to the contrary, but merely withdraws a privilege to operate in the event the beneficiary fails or

is unable to avail himself of the privilege within a specified time. As we see it, the sole question is whether in the exercise of our proper function we should read into a Legislative Act a provision wholly unauthorized by its text and foreign to its intent. If the Legislature had indicated that delay beyond sixty days in beginning operation under the Certificate might be excused if occasioned by unavoidable casualty, or, for that matter, by any circumstance or state of fact whatever, we could reasonably hold that such delay should be excused when occasioned by the necessity of complying with interfering war time regulations, although the Legislature had not foreseen their promulgation. Courts are not limited to the literal wording of an Act indicating what exceptions to its operations are permissible when any, by its terms or necessary intendment, are permissible. But where it is apparent that no exceptions were intended, we cannot properly create them. Here, assuming the Statutes to have been observed, the public demand for service caused the Certificate to be issued. The same demand dictated that if the service was not properly inaugurated, the opportunity to supply it should be opened to others who might be able to do so. The primary intent to benefit the public is apparent in all of the Statutes regulating the granting and revocation of such certificates; and hence, the intent of the Legislature that there should be no exceptions to the operation of the provision here under consideration is likewise apparent. Moreover, even though it were material to the decision of the case, we could not say that no other company could have secured a Federal certificate within a period of sixty days merely because appellee was unable to do so."

Now, upon the idea that the decision of the Court of Appeals of Kentucky draws in question the validity of a state statute, on the ground of it being repugnant to the General Order No. 21 of the Office of Defense Transportation, it is sought to invoke jurisdiction. We do not question the

validity of General Order No. 21 of the Office of Defense Transportation. However, we do insist that the question involved is not substantial.

*First.* There is no conflict between the state statute and the federal regulation. They do not even deal with the same subject matter.

The state statute goes no further than to require that if one to whom a certificate authorizing a bus operation has been granted fails to begin operation within sixty days after the issuance of the certificate, such certificate "shall be and become null and void". It does no more than withdraw the privilege to operate if the holder of the certificate fails to begin operations. Such statute rests upon a sound basis. A certificate may be granted only upon a finding by the Director of the Division of Motor Transportation that the convenience and necessity of the public (to be served by the proposed route) requires such service (KRS, 291.090). If a certificate may be issued only when the convenience and necessity of the public is such as to require the proposed service, then the same convenience and necessity of the public would require that such service be made available to the public within a reasonable time. The Legislature determined sixty days to be a reasonable time.

Section 501.91 of General Order No. 21 of the Office of Defense Transportation goes no further than to provide that "on or after November 15, 1942, no person shall operate any commercial vehicle * * * unless there is in force with respect to such commercial vehicle a Certificate of War Necessity issued by the Office of Defense Transportation governing such operation." The language of the regulation is simple. The meaning of the regulation is plain. It means, just as stated therein, that no person shall operate any commercial vehicle for any purpose unless there is in force with respect to such vehicle a Certificate of War Neces-

sity. Such regulation, and its enforcement has contributed much to the war effort through the elimination of the unnecessary consumption of transportation equipment, gasoline, and tires.

The state statute does not require that the holder of a certificate do anything contrary to the requirement of the federal regulation. There is nothing in the state statute which is inconsistent with, or could conceivably interfere with the operation or enforcement of the federal regulation. It is only when the operation of a federal statute or regulation must be frustrated and its provisions be refused their proper effect, that a state law must yield and the federal statute or regulation be held to override or suspend it.

In *Savage* v. *Jones*, 225 US 501, the rule is thus stated:

> "* * * For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress, within the sphere of its delegated power."

In *Dickson* v. *Uhlmann*, 288 US 188, in holding that the Missouri Bucket Shop Law was not in conflict with or suspended by the Federal Grain Futures Act, the Court said:

> "* * * Since there is nothing in the state law which is inconsistent with, or could conceivably interfere with the operation and enforcement of, the federal law, the statute of Missouri was not suspended."

The state statute in no way interferes with the operation or enforcement of the federal regulation. It does not require that the holder begin operation; but, much to the contrary, merely withdraws, as the Court of Appeals pointed

out, "a privilege to operate in the event the beneficiary fails or is unable to avail himself of the privilege, within the accepted time."

The state statute involves an exercise by the state of its police power—the regulation of an intrastate bus operation, a subject over which Congress would have no jurisdiction, except in the exercise of its war powers. In *Cary* v. *State of South Dakota*, 250 US 118, it said that "• • • the intent to supersede the exercise by the state of its police powers is not to be implied unless the Act of Congress, fairly interpreted, is in actual conflict with the laws of the state."

In *Mauer* v. *Hamilton*, 309 US 598, it is further said:

> "As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is expressly the case where the public safety and health are concerned."

There could exist, as we see it, no reasonable basis upon which it may be said that the Office of Defense Transportation in the promulgation and adoption of General Order No. 21 intended to take from the states their right to determine and control the terms and conditions upon which a grant of a privilege to conduct an intra-state bus line operation may be made. The federal regulation is applicable to all commercial vehicles—trucks, busses and otherwise. The regulation does not in any wise deal with the granting or revocation of certificates authorizing an intra-state bus operation. The state statute does not require that the holder begin operation within a specified time. In an effort to insure that there be made available to the public any service found to be necessary, the statute merely provides that the rights which a holder has under a certificate shall be and become null and void if the holder fails to begin operation

within the time specified—a withdrawal of the privilege granted.

General Order No. 21 of the Office of Defense Transportation had been promulgated and adopted, and was in full force and effect at the time, as well as for a considerable period of time prior to the issuance of the involved certificate to the appellant. We must assume that the appellant then knew that before he could begin operation under the certificate it would be necessary that he obtain a Certificate of War Necessity for the bus or busses to be used over the route, as well as otherwise comply with the requirements of the state statutes with respect to the payment of his "tag" tax (KRS, 281.520), the filing of a bond to secure the payment of mileage taxes (KRS, 281.080(3)), and the filing of the required public liability insurance bond (KRS, 281.080(1)). The certificate was issued upon condition that if he failed to begin operation within sixty days, the privilege conferred by it should expire. The statute contains no exceptions. The Court of Appeals of Kentucky has held that there were no exceptions, and that the holder of a certificate must begin operation within the required time, otherwise the privilege granted expires, irrespective of the reason why the holder failed to begin operation.

Second. The certificate was issued on June 29, 1943, to the appellant. The appellant filed his original response on December 1, 1943. A period of more than five months had elapsed between the date of the issuance of the certificate and the filing of the response. Yet, the appellant had not commenced operation on December 1, 1943. As excusing his failure to have done so, the appellant in his original response stated that immediately after the issuance of the certificate to him, he "sought to obtain authority from the Office of Defense Transportation of the United

States Government to commence operations and to inaugurate service but he was advised by the Federal officials charged with the responsibility of issuing gasoline and approving public transportation operations that it should not commence operations under this certificate until further notice from them, and in order to comply with the Federal regulations and so as not to prejudice the right to obtain gasoline, tires, busses and replacements and in order to fully comply with the directions of the Federal officials it deferred placing said bus service in operation" (R. 19). Such allegation is in effect an admission that the Office of Defense Transportation at the very outset refused to issue a Certificate of War Necessity authorizing the use of the transportation equipment necessary to conduct such operation. Now, notwithstanding his admitted inability to render the public service required by the certificate, the appellant seeks to retain the privileges conferred by the certificate.

The Franklin Circuit Court in its judgment required the Director of the Division of Motor Transportation to reinstate the certificate of the appellant, and "to certify to the Office of Defense Transportation and the Office of Rubber Conservation and any other Federal agency, to whom certification may be necessary, that such certificate is valid and in full force and effect and that it is authorized to conduct a common carrier bus operation over the route set out in said certificate" (R. 35). The certificate of the appellant was reinstated by the Director of the Division of Motor Transportation, in conformity with such judgment, on February 4, 1944. The appellee did not supersede or otherwise suspend the judgment of the Franklin Circuit Court pending the appeal to the Court of Appeals of Kentucky. The Court of Appeals of Kentucky has stayed the enforcement of the judgment pending the disposition of this appeal (R. 84). Thus, as you see, the

certificate of the appellant has been in full force and effect since the 4th day of February, 1944—more than one year, and yet the appellant has not commenced operation. It is rather evident that the appellant is unable to obtain the required consent of the Office of Defense Transportation. Notwithstanding, the appellant has been able to retain, and now seeks to obtain the right to continue to retain the certificate without conducting any operation under it, thus depriving the public of the service and preventing the Director of the Division of Motor Transportation from issuing a certificate to another who might be able to inaugurate service.

The route authorized by the certificate passes through a thickly settled coal mining area. Coal mining is a most essential industry. If in fact there existed any real necessity for the operation authorized by the certificate, and if in fact the appellant in good faith ever intended to operate under it, in view of the great effort which the Office of Defense Transportation has made to make adequate transportation available to those engaged in essential industry, the alleged inability of the appellant to obtain the required approval of the Office of Defense Transportation is just a little difficult to understand.

Third. The appellant cites, and in the main relies upon the case of *Southern Railway Company* v. *Reid*, 222 U. S. 424. In that case the North Carolina statute was in direct conflict with, and if permitted to remain would interfere with and prevent an enforcement of the involved regulation of the Interstate Commerce Commission. We do not have such a situation in the case at bar.

It, thus, being shown that the involved state statute is not in conflict with, and does not interfere with the operation or enforcement of the federal regulation, it is thought

rather evident that the claim of the appellant that the state statute was suspended by the federal regulation is not substantial, and that the motion to dismiss the appeal should be sustained.

Respectfully submitted,

LESLIE W. MORRIS,
MARION B. RIDER,
*Attorneys for the Appellee,*
*Straight Creek Bus, Inc.*

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

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## No. 1204

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MORRIS SAYLOR, DOING BUSINESS AS BELL COACH LINES,
*Appellant,*

*v.*

STRAIGHT CREEK BUS, INC., A CORPORATION, ET AL.,
*Appellees*

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### MOTION TO DISMISS

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The appellee, Straight Creek Bus, Inc., moves the Court to dismiss the appeal herein, for the reason that the federal question upon which jurisdiction is predicated is not substantial.

WHEREFORE, the appellee, Straight Creek Bus, Inc., prays that the appeal granted herein be dismissed.

LESLIE W. MORRIS,
MARION B. RIDER,
*Attorneys for Appellee,*
*Straight Creek Bus, Inc.*